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No. 84-1205

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1984

INTERNATIONAL WOODWOORKERS OF AMERICA, LOCAL 3-261,

Petitioner,

v.

IRENE KUHN, Personal Representative of the Estate of Wolfgang D. Kuhn,

Respondent.

Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTION PRESENTED FOR REVIEW

Whether this Court's decision in DelCostello v. Teamsters, 462 US 151, 103 S Ct 281, 76 LEd2d 476 (1983) (which limits to six months the time within which claims of breach of the duty of fair representation may be brought against labor organizations) applies retroactively to claims pending in the United States District Court for the District of Oregon prior to the date on which DelCostello was decided.

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STATEMENT OF THE CASE

Because this action was dismissed by judgment on the pleadings before any evidence was presented, the facts are taken from plaintiff's Complaint. Wolfgang Kuhn was employed by Weyerhaeuser Corporation in North Bend, Oregon, on August 6, 1965, and was classified as a hyster driver on August 30, 1965. He was continuously employed in that classification until May 4, 1981, when he was discharged. (CR 1, ER 1). The pretext for the discharge was Mr. Kuhn's alleged history of safety violations, and that he had, while driving his hyster, struck and damaged a support post, thereby spilling part of a load of plywood and endangering a co-worker's

life. In fact, Mr. Kuhn had not hit the support beam and had not endangered any co-workers.

The real reason for Mr. Kuhn's discharge was that he was personally disliked by his supervisor and therefore discriminated against and singled out for unfair criticism. The charges concerning the striking of the support beam and the endangering of the co-worker were based upon statements made to the supervisor by one Ernie Larson, who the union, IWA Local 3-261, permitted to represent Mr. Kuhn in the ensuing grievance proceedings.

IWA and Weyerhaeuser had entered into a collective bargaining agreement which provided, in part, that employees would not be suspended or

discharged except for "just cause." The discharge of Mr. Kuhn was without "just cause," and Mr. Kuhn protested his discharge to the union and a grievance was filed. IWA'S representation of Mr. Kuhn throughout the grievance process was arbitrary, perfunctory and in bad faith, in that it failed to investigate Mr. Kuhn's claims prior to meetings of the standing committees, failed to call any witnesses on Mr. Kuhn's behalf, although such witnesses were available, and permitted Mr. Kuhn's accussor to represent him.

On May 19, 1981, Weyerhaeuser offered Mr. Kuhn a position as a utility worker, the lowest classification in the plant, at a $.70 per hour wage reduction. The offer was

open until June 15, 1981, at which time Weyerhaeuser would withdraw it and finally terminate Mr. Kuhn. The executive committee of the IWA local advised Mr. Kuhn that it would call a special meeting for the purpose of conducting a strike vote. However, at the regular union meeting on June 14, 1981, a union representative made a false public announcement that Mr. Kuhn had no support among his co-workers. Mr. Kuhn was therefore forced to choose between accepting the utility worker position or being finally terminated before a strike vote could be called, and he was operating under the mistaken belief that his cause had no support.

As a result of the IWA'S breach of its duty of fair representation,

Mr. Kuhn was forced to accept the utility worker position. That position required Mr. Kuhn to handle industrial chemicals to which he was allergic and which resulted in severe dermatitis and other allergic reactions, which prevented Mr. Kuhn from working a great deal of the time. Despite this, the union refused to negotiate further with Weyerhaeuser to find Mr. Kuhn work which he was able to perform.

As a result of the wrongful discharge by Weyerhaeuser and the IWA's breach of its duty of fair representation, Mr. Kuhn suffered illness, medical expenses, lost wages and lost benefits.

Mr. Kuhn filed a complaint in the United States District Court for the

District of Oregon on May 4, 1983, naming as defendants Weyerhaeuser Corporation and IWA, Local 3-261. The complaint alleged a cause of action against Weyerhaeuser for unjust dismissal, and against the union for breach of its duty of fair representation. After both defendants had filed answers, the union moved to dismiss the action as time barred. The District Court concluded that this court's decision in DelCostello v. Teamsters, 462 US 151, 103 S Ct 281, 76 LEd2d 476 (1983), decided June 8, 1983, should apply retroactively to bar Mr. Kuhn's claim. On its own motion, the District Court granted judgment on the pleadings to defendant Weyerhaeuser as well.

Mr. Kuhn appealed to the Ninth

Circuit Court of Appeals on December 13, 1983. He subsequently voluntarily dismissed his claim against Weyerhaeuser, conceding it was time barred under United Parcel Service v. Mitchell, 451 US 56, 67 LEd2d 732 (1981), which had been decided before the original complaint was filed.

In an unpublished opinion, the Ninth Circuit reversed the District Court, holding that DelCostello did not apply retroactively to bar this claim. The union petitioned for rehearing and the court denied the petition on October 26, 1984.

ARGUMENT

The Petition for Writ of Certiorari should be denied because the Ninth Circuit correctly determined that DelCostello should not be given

retroactive effect to shorten the statute of limitations in existence in the Ninth Circuit at the time this action was filed, and because this issue is not of substantial enough importance to merit the attention of the Court.

The Ninth Circuit first confronted the issue of whether DelCostello should be retroactively applied in Edwards v. Teamsters Local Union No. 36, 719 F2d 1036, 1038 (9th Cir. 1983). In deciding whether to apply DelCostello retroactively, the Edwards court reviewed the factors to be considered:

> "First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied. .

> ., or by deciding an issue of first impression whose resolution was not clearly foreshadowed. . . Second, it has been stressed that 'we must. . . weigh the merits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.'. . . Finally, we have weighed the inequity imposed by retroactive application, for '[w]here a decision of this court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity.'"

719 F2d at 1040, quoting, Chevron Oil Co. v. Houson, 404 US 97, 106-07 (1971).

The Edwards court concluded that the first criterion was met because the DelCostello ruling had not been "clearly foreshadowed" by previous decisions, and because it effectively overruled Price v. Southern Pacific

Transportation Co., 586 F2d 750, 753 (9th Cir. 1978), which had applied the longer 3-year California statute of limitations for bringing an action on a statute. Edwards v. Teamsters Local Union No. 36, 719 F2d at 1040. Edwards further found that the second and third criteria weighed against retroactive application, because the reasons behind allowing actions against a union for breach of the duty of fair representation would be disserved by barring a suit by an employee when a longer statute of limitations pertained when the suit was filed, and because "it would. . . produce the most 'substantial inequitable results'. . . to hold the respondent 'slept on his rights' at a time when he could not have known the

time limitation that the law imposed on him." 719 F2d at 1040, quoting Chevron Oil Co. v. Houson, 404 US 97, 108. The Ninth Circuit recognized that a critical factor is whether the new rule is one which might not have been anticipated. Id. at 1041; Singer v. Flying Tiger Line, 652 F2d 1349, 1353 (9th Cir. 1981).

In evaluating whether DelCostello should be given retroactive effect to bar the particular claim involved here, this Court should examine not only its own previous decisions, but also the state of law in the Ninth Circuit at the time this claim was filed, to determine whether DelCostello was clearly foreshadowed and whether it would be unfair to give it retrospective effect. In UAW v.

Hoosier Cardinal Corp., 383 US 696 (1966), this Court established that, in general, "the timeliness of a Section 301 suit. . . is to be determined, as a matter of federal law, by reference to the appropriate state statute of limitations." Id. at 704-905. This court continued to adhere to that approach in United Parcel Service v. Mitchell, 451 US 56 (1981). That case held that a suit of this type was governed by a state statute of limitations for vacating an arbitration award, rather than a statute for an action on a contract. Mitchell did not decide, however, the question of whether the action against the union for breach of the duty of fair representation might be governed by a different limitations

period than the action against the employer for wrongful discharge. That question had previously been decided in the affirmative in the Ninth Circuit in Price v. Southern Pacific Transportation Co., 586 F2d 750, 753 (9th Cir. 1978). Price characterized the action against a union as "an action upon liability created by statute," and held that the most analogous state statute of limitations in California was the 3-year limitation for an action upon a liability created by statute.

After the Mitchell decision, the Ninth Circuit was called upon to determine the appropriate statute of limitations for the action against a union in Oregon in McNaughton v. Dillingham Corp., 707 F2d 1042 (9th

Cir. 1983). In that case, the Ninth Circuit noted that Mitchell had not resolved the question as to the appropriate limitations period for an action against a union, but only for the action against the employer. The court went on to hold that, in Oregon, the appropriate statute of limitations for the action against a union is ORS 12.110, which establishes a 2-year period for bringing a professional malpractice action. 707 F2d at 1048-49. The Ninth Circuit did follow Mitchell however, in applying the 20-day arbitration statute of limitations of ORS 33.310 to the action against the employer.

Whatever the situation may have been in other circuits, there can be no doubt that DelCostello constituted

a sharp break with the existing precedent in the Ninth Circuit, especially with regard to the applicable statute of limitations to be applied in this type of action in Oregon. It is equally clear that neither the Ninth Circuit nor Mr. Kuhn could have anticipated the DelCostello decision. Because the equities of retroactive application differ from circuit to circuit depending upon the state of the law in each circuit prior to the time DelCostello was decided, this Court should leave the individual circuits to determine whether the decision should be retroactively applied.

The issue involved in this case is not likely to arise in future cases. The Ninth Circuit's decision in

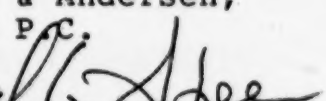
Edwards relied heavily upon the unfairness of applying a shorter statute of limitations than that pertaining when the action was filed. 719 F2d at 1040. Thus, all actions filed after the date of the DelCostello decision, June 8, 1983, would be subject to the 6-month statute of limitations, rendering it unlikely that further cases involving this issue will arise.

CONCLUSION

For the reasons stated in this brief, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

Speer, Jones & Andersen,
Lawyers, P.C.

By: 
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